

THE CITY OF BOZEMAN

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21 October 1997

Office of the Secretary  
Federal Communications Commission  
Washington, DC 20554

Dear Secretary:

The following comment is offered in response to the Notice of Proposed Rule Making, FCC 97-296, published in the Federal Register on September 2, 1997.

1) (II. Background, No. 2) The construction schedule approved with the Fifth Report and Order (FR&O) allows a minimum of twenty-three (23) months after the effective date of the final rule for broadcasters to comply. The May 1, 1999 deadline only applies to ten broadcast markets. Longer times, up to six (6) years, are available for other broadcast entities to comply. The FR&O, para. 87 notes that "...broadcasters have been on notice throughout this proceeding of the impending need to convert to DTV." Further, paras. 88-91 note that several broadcasters had, prior to the FR&O, already commenced site acquisition and development, and that others would be able to utilize existing towers.

Given these facts we do not agree with the assertion of the Petitioners that there is adequate justification to preempt state and local regulations on the undemonstrated potential for some delay resulting from permit processing. Also, as noted in the FR&O in numerous places, administrative relief is possible by the FCC from the construction deadline.

2) (II. Background, No. 4) Petitioners have asked for relief from state and local regulation to the extent that they unreasonably delay DTV implementation. Several important terms are undefined in the request. The proposed rule sets specific numbers of days within which local entities must act. It is not defined whether the numbers of days specified are calendar days or working days. As this makes a difference of 28% or greater in the number of working days to process a request this is a critical issue.

Additionally, the action required to be taken is not defined as preliminary or final action. Under our review process, when a project has been preliminarily granted approval the applicant must then make a final submittal demonstrating how (s)he have complied with the conditions of approval. They have up to six months in which to do so. If the required action is defined as final approval this will guarantee that no projects will meet the deadlines the petitioners have requested.

No definition of unreasonably is provided. We have established review periods for development applications which are necessary to evaluate the impacts of a development on surrounding properties. These reviews periods are consistent and necessary to protect the health

008

and welfare of the citizens of our jurisdiction. We assert that local regulations are established for good and valid reasons and that compliance with them is not injurious to the developing party.

The petitioners proposed rule also requests preemption of local regulations based on radio frequency emissions. Section 332 (c)(7)(B) of the Communications Act already clearly exempts facilities which comply with FCC guidelines from regulation by state and local entities. If this is the limit of the petitioners request then the proposed rule is redundant and unnecessary. If the proposed rule is intended to exempt broadcasters from regulation when they are not in compliance then the proposed rule is not in accord with the letter or spirit of the law or the intent of the Congress. Compliance with FCC RF emission standards is clearly a prerequisite for exemption from local regulation per Section 332 (c)(7)(B)(iv) of the Communications Act.

The second item to be removed from local consideration is interference with other telecommunication signals and consumer electronics. This is an exclusively federal regulatory area, as detailed in the 1982 amendments to the Communications Act; the proposed rule is redundant and unnecessary. As goal four (4) of FR&O, para. 4 is to minimize regulation, it appears counter productive to create a new regulation to restate what is already clearly laid out in federal law.

3) (II. Background, No. 4) The petitioners have requested an extremely broad exemption from local regulations, under the guise of DTV schedule compliance, which would apply across the entire country. It would apply to all areas including those which have more than four (4) years to comply with the DTV construction schedule. This appears to again contradict goal four (4) mentioned above. As discussed in response item 1 above, adequate time for compliance is available to the industry. Therefore, the exemption is unnecessary. To regulate the entire country based on issues identified for less than three percent (3%) of the industry is poor stewardship.

The requested rule would provide a unique exemption to a specific industry which is unprecedented and unwarranted. In considering personal communication services the Congress explicitly stated that they did not wish to create a class of industry excluded from local regulation, it seems unlikely that they wished to do so in regards to DTV. To exempt a specific group of businesses from compliance with the law appears to be incompatible with the equal protection requirements of the Fourth Amendment to the Constitution. It would also be incompatible with the statement in para. 8 in the Notice of Proposed Rule Making that the Commission should not interfere with aesthetic regulations as no federal objectives are likely to be impeded during the four (4) year construction schedule for the majority of broadcasters.

Given the character of television broadcast structures it seems unlikely that aesthetic, landscaping, or other similar concerns would pose a substantive impediment to their construction if life safety issues have been previously resolved. This exemption would allow a broadcaster to challenge, line by line, every provision of land use ordinances and create a substantial time and financial burden for local governments. The National Environmental Policy Act of 1969 requires federal agencies to evaluate the effects of their actions on the quality of the human environment. The visual character of a city or region is a substantial component of the human environment. To needlessly remove from communities their ability to influence their environment is not desirable.

4) (III. Discussion, No. 5) The Commission has sought comment on when it may be necessary to preempt specific state and local legislation in order to maintain the construction schedule necessary to implement DTV. We assert that with a minimum time of twenty-three (23) months available for compliance there are no circumstances, which may be determined in advance or as a class, where local preemption is warranted. The FR&O specifically considered and addressed the fact that the most stringent requirements were being applied to those broadcasters best able to comply. Additionally, it was extensively noted in paras. 87-93 of the FR&O that the time schedule would be nonburdensome to broadcasters, that several stations were already

broadcasting in DTV format, and that multiple experimental licenses have been granted to pursue DTV. Further, it was stated that broadcasters may use existing antennas and other structures to provide the necessary broadcast infrastructure to comply.

We assert that it is unlikely that any preemption is necessary. Furthermore, with a compliance period in excess of four (4) years, there is no basis for preemption outside of the top 30 markets. If compliance has not been obtained by 2002 it will have been through the inaction of the broadcasters, not the regulatory strictures of local governments.

5) (III. Discussion, No. 6) As noted in the Notice of Proposed Rule Making, it is clearly stated in the Communications Act that regulation based on RF emission of complying facilities. Radio frequency interference is already prohibited to local and state governments. There is no need to add further regulations to restate what is already clear and obvious. See Item 2 above.

6) (III. Discussion, No. 7) Compliance with local and state regulation will not impede the rapid recovery of spectrum as the construction schedule does not mandate return of spectrum until 2002 at the earliest to allow for phase in of broadcasting.

7) (III. Discussion, No. 8) As the four (4) year minimum construction schedule for most broadcasters allows abundant time for compliance there is no basis for an assertion that Congressional or FCC objectives are being thwarted by compliance with local regulations. The only area where there may be any issue of construction scheduling is the top thirty (30) markets. Therefore, no regulation should be promulgated which would impact areas outside of those markets. The Commission should adhere to the quote in para. 8 of this Notice of Proposed Rule Making and not interfere with the legitimate affairs of local governments including health, safety, and aesthetic regulations.

8) (III. Discussion, No. 9) The breadth of the petitioners request indicates that they desire to obtain through administrative means what they were unable to achieve through legislative action. There is no rational basis to exempt the broadcast industry from compliance with the law. To do so would be an explicit contradiction to the equal protection of the law required by the Fourth Amendment to the Constitution. Under no circumstances can an exemption be justified for all broadcast facilities as requested by the petitioners.

9) (IV. Request for Comment, No. 10) We assert that, as the FCC has stated in the FR&O, the existing construction schedule for DTV implementation is nonburdensome to the broadcast industry and may be complied with while meeting the relevant state and local regulations. The minimum available time is twenty-three (23) months from the adoption of the FR&O which adopted the schedule. The next tier of broadcasters have twenty-nine (29) months to comply. The remaining broadcasters have more than four (4) years in which to comply. We agree that the DTV stations now in operation will provide critical information to allow all other entities to comply with the FCC schedule. Given these facts we assert that it is very premature to consider the preemption of state and local regulation. Further, there is abundant time to comply for the great majority of service providers. It would be unwise to strip regulatory ability from the great majority of local governments in order to address ten (10) to thirty (30) possible situations.

The petitioners request to universally exempt broadcast facilities, when there is no overwhelming public need and the purpose, clearly delineated by the Congress, is not in compliance with existing law. This would establish a highly undesirable precedent.

10) (IV. Request for Comment, No. 12) A request for siting of a telecommunications broadcast facility would be classified by the City of Bozeman as an Essential Service Type II and

would be processed as a Conditional Use Permit. For these types of administrative reviews we are required by state law, Montana Code Annotated §76-2-303, to advertise the public hearing at least 15 days in advance. With the lead time required to submit notices to the newspaper, this normally requires a minimum of 20 days after the receipt of a complete application.

As shown on the enclosed information a minimum of eight weeks is required to process the complete application for a preliminary site plan approval. This is a uniform time for all conditional use permit applications. The required time may be longer depending on scheduling of meetings and if a submittal is received immediately after a filing deadline. Zoning variances, when in conjunction with a project such as a Conditional Use Permit, are processed simultaneously with the other application and receive a decision at the same time as the preliminary approval or denial.

One item which is beyond the ability of the City to regulate is the submission of a complete original application. It is uncommon, but occasionally there is a need to suspend processing, or to refuse processing of an application, because the applicant did not provide the basic information needed to evaluate the project. The application forms all have submittal checklists which note, in detail, the information which is required to be submitted in order to accomplish a review. Even so, applicants, on occasion, choose to not provide adequate information.

When a preliminary approval has been granted, usually with some conditions, the applicant then prepares and submits a final site plan which demonstrates how all of the conditions have been or will be completed. The processing of the final site plan generally requires less than 30 days, again depending greatly on the submittal of complete information. When a preliminary approval has been given, applicants may also apply for a building permit, which is not issued until final site plan approval has been obtained. They may proceed with site preparation work including site grading, excavation for foundations, and the placement of concrete forms, but no concrete or other permanent structure may be placed until a building permit is obtained.

The Commission should only consider preemption when it can be shown that a municipality or state has failed to process an application to establish or modify a broadcast facility in the same manner as other applications of the same type.

Respectfully,



Chris Saunders  
Associate Planner

attachments: Informational Guide for Conditional Use Permit

CCS/ccs

cc: Clark V. Johnson, City Manager  
Ron Brey, Assistant City Manager  
Paul Luwe, City Attorney  
Andrew C. Epple, Planning Director  
file



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PLANNING OFFICE**  
35 North Bozeman Avenue  
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INFORMATIONAL GUIDE FOR:  
**CONDITIONAL USE PERMITS**

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This information is provided as a guide to assist you in the preparation of your application for a conditional use permit. It is also intended to explain the application process.

**WHAT IS A CONDITIONAL USE PERMIT?**

a conditional use permit (CUP) allows certain uses to be located in an area on a case by case basis after review by the Bozeman City-County Planning Board and City Commission. This review is required in order to ensure that the proposed use will not endanger public health and safety and that it will be appropriate in its proposed location.

**WHEN IS A CONDITIONAL USE PERMIT REQUIRED?**

A conditional use permit is required of all uses or development proposals listed as conditional in the Bozeman Area Zoning Ordinance.

**WHAT INFORMATION IS REQUIRED?**

**APPLICATION FORM**

Visit the City-County Planning Office to determine if what you are proposing will require a conditional

BOZEMAN CITY-COUNTY PLANNING OFFICE

Box 640  
Bozeman, MT 59715

proposal and answer any of your questions. If a conditional use permit is required, you will be given the appropriate forms, advised of the materials and application fee that are needed and informed of the time period when the application will be processed.

A formal submittal for conditional use permit approval will, amongst other things, require the preparation of a site plan which indicates the location of existing and proposed improvements (i.e. structures, parking, landscaping, etc.) It is often beneficial to contact a professional design office to assist you with your submittal requirements. The Planning Office also recommends that you take part in an informal/pre-application meeting and review of conceptual plans with planning staff. This review can prove to be very helpful in the preparation of your proposal and can save you time and money.

#### **WHAT IS THE APPLICATION PROCESS?**

##### **STAFF REVIEW**

When your application is submitted to the Planning Office, it will be assigned to a staff planner. The staff planner will review your application for compliance with requirements of the Zoning Ordinance. Your application will also be routed to the Development Review Committee (DRC) and any other necessary agencies for their review.

##### **DESIGN REVIEW BOARD (DRB)**

If your project is located within the "Conservation Overlay" district or one of the City's "Entryway Corridors", it will also be reviewed for "Certificate of Appropriateness" approval by the Design Review Board (DRB). The Design Review Board is responsible for the evaluation of projects with regard to design features. For more information on design review, please consult the "Informational

#### **PUBLIC HEARINGS**

A notice of public hearing will be sent to property owners within 200' of your site, posted at the site and published in the newspaper informing the public of the date, time and place of the public hearings before the City-County Planning Board and City Commission. The hearings give citizens a chance to comment on the proposed conditional use permit.

##### **Planning Board**

Once the development review committee (DRC) has reviewed your project for compliance with City codes, the project planner will prepare a report which incorporates the comments of each of the agencies involved in the review process. This report is then presented to the City-County Planning Board who is responsible for recommending approval or denial of the conditional use permit after considering the information in the staff report and any testimony given at the public hearing. This recommendation is then forwarded to the City Commission.

##### **City Commission**

The City Commission is the final decision making authority for conditional use permit applications. The Commission will consider the recommendation of the Planning Board, the information presented in the Planning Board staff report, and any testimony given at the public hearing(s). The Commission will then act upon your application or continue the item to their next meeting in order to reach a final decision. The conditional use permit process usually takes eight to twelve weeks from the time an application is filed until a decision is reached by the Commission.

#### **PROJECT APPROVAL**

effective subject to any required conditions. Within six months of approval, a final site plan which incorporates any required conditions must be submitted and approved by the Planning Office. A building permit (if necessary) must be obtained within one year of final site plan approval for your conditional use permit. You must also enter into an improvements agreement with the City to ensure project completion. Should you wish to occupy a new building prior to completion of your project, the improvements agreement must be secured by a method of security equal to one and one half times the amount of the scheduled improvements not yet installed. Thereafter, your project must be completed within nine months of occupancy.

#### **IS THERE ANY ADDITIONAL INFORMATION I NEED TO KNOW?**

##### **SIGNAGE**

If you request signage as a part of your conditional use permit application, the sign must conform to the standards of the Bozeman Area Sign Code.

##### **BUILDING STANDARDS**

If you are going to operate your conditional use in an existing building, you should check with the City's Building Department to determine if the use is appropriate in the structure or if modifications will need to be made in order to bring the building up to Uniform Building Code (UBC) standards.

#### **CHAPTER 18.53 OF THE ZONING ORDINANCE**

For a complete discussion of the conditional use permit process, see Chapter 18.53 of the Bozeman Area Zoning Ordinance.

# PROCESS FLOWCHARTS - CONDITIONAL USE PERMIT APPLICATIONS

TYPE OF APPLICATION

WEEK 1\*

WEEK 2

WEEK 3

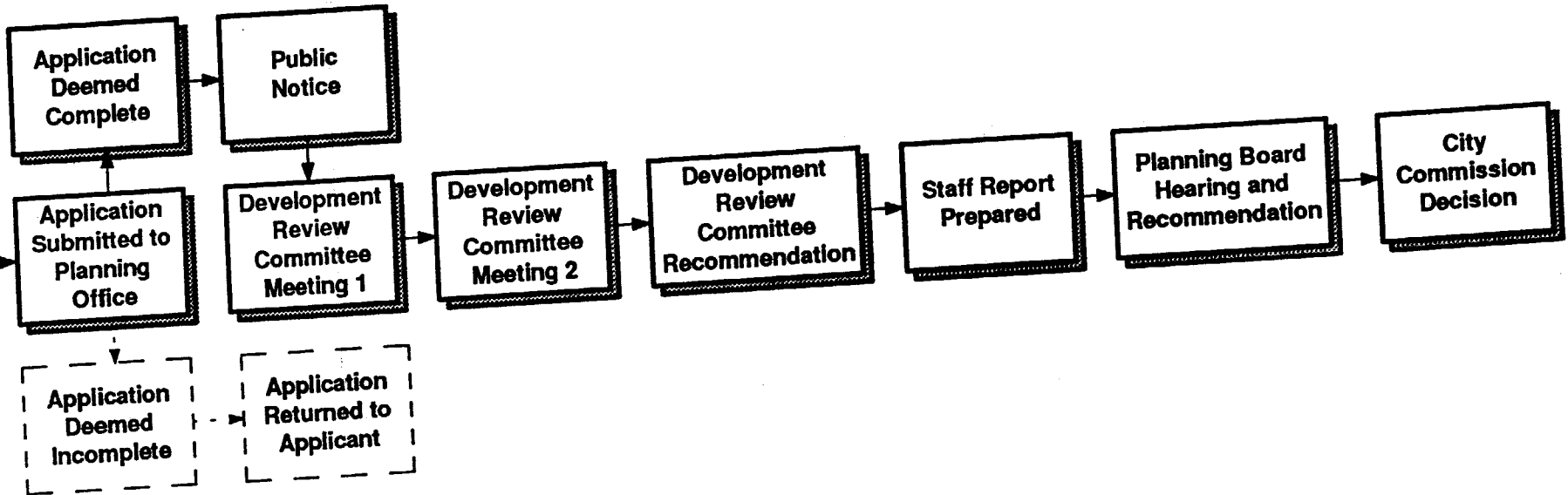
WEEK 4

WEEK 5-6

WEEK 7

WEEK 8

Conditional Use Permit Applications



Conditional Use Permit Applications Within Overlay District

